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No. 88-325

In the Supreme Court of the United States

OCTOBER TERM, 1989

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,
PETITIONERS

v.

MAURICE SMITH, DIRECTOR, ARKANSAS HIGHWAY AND TRANSPORTATION DEPARTMENT, *et al.*, RESPONDENTS

On Writ of Certiorari to the Supreme Court of Arkansas

MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF FOR THE PETITIONERS ON REARGUMENT AND SUPPLEMENTAL BRIEF FOR THE PETITIONERS ON REARGUMENT

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Petitioners hereby move for leave to file the attached Supplemental Brief on Reargument. This case was argued on March 22, 1989. On July 3, 1989, the Court issued an order restoring the case to the calendar for reargument. On October 20, 1989, respondents moved for leave to file a brief on reargument. That motion was granted by the Court on November 6, 1989. The attached brief responds to the arguments set forth in respondents' brief on reargument.

Respondents' brief on reargument asserts that several decisions rendered by this Court last Term lend support to their position in this case. See Ark. Mot. ii; Rearg. Br. 5-8, 11-13. In fact, as the attached brief explains (at 4, 8, 11), one of the decisions—*Pennsylvania* v. *Union Gas Co.*, 109 S. Ct. 2273 (1989)—actually supports peti-

tioners' position before this Court. The attached brief further explains why the other cases cited by respondents are irrelevant to the issue presented for decision in this case.

Respondents' reargument brief also elaborates upon and revises several factual arguments that respondents presented in their earlier brief in this case. It is our submission that the new version of these arguments is based on a complete misreading of this Court's decision in *American Trucking Ass'ns, Inc.* v. *Scheiner*, 483 U.S. 266 (1987), and of the record in this case. However, as respondents themselves acknowledge (Mot. iii), "these arguments cannot be readily answered except in writing."

This Court's procedures give the petitioner in every case the right to respond to arguments advanced by the party that prevailed in the court below. See, *e.g.*, Sup. Ct. R. 35. The arguments presented in respondents' latest brief are new or materially altered from their earlier submissions, else there would have been no basis for them to submit a further brief. Considerations of basic fairness dictate that petitioners should be granted an opportunity to respond to these arguments.

For the foregoing reasons, petitioners request leave to file the attached Supplemental Brief on Reargument.

Respectfully submitted.

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SUPPLEMENTAL BRIEF FOR THE PETITIONERS ON REARGUMENT

INTRODUCTION AND SUMMARY OF ARGUMENT

When the instant case arrived in this Court, it presented what appeared to be a significant but relatively straightforward question of federal law regarding the retroactivity of a Commerce Clause decision of this Court —*i.e.*, whether petitioners' request for refunds of flat highway taxes exacted between the filing of this suit in May 1983 and the entry of Justice Blackmun's escrow order in August 1987 would be governed by the Commerce Clause principles applied in June 1987 in *American Trucking Associations, Inc.* v. *Scheiner*, 483 U.S. 266 (1987).

To the extent that the Arkansas Supreme Court found *Scheiner* applicable (*i.e.*, to HUE tax payments made after Justice Blackmun's escrow order), it ordered refunds. Its refusal to grant refunds of earlier payments was based entirely on its application (or misapplication) to *Scheiner* of the federal retroactivity rule announced by this Court in *Chevron Oil Co.* v. *Huson*, 404 U.S. 97

(1971). See Pet. App. 3a. In opposing certiorari, Arkansas too acknowledged that only the federal question of *Scheiner*'s retroactivity would be before this Court, pointing out that "[t]he Arkansas Supreme Court * * * did not reach questions of state law * * * [such as] Sovereign Immunity." Br. in Opp. 4.

Once certiorari had been granted, however, Arkansas, supported by its amici National Conference of State Legislatures, *et al.* (NCSL), changed its tack dramatically, bombarding this Court with a wide variety of arguments designed to persuade it that somehow or other it could not reach the issue decided below and taken for review. Among the reasons advanced in this anything-but-*Chevron* flurry of contentions are: that the Eleventh Amendment forecloses this Court from exercising its appellate jurisdiction over this case; that the Commerce Clause confers no right to monetary relief upon those injured by its violation; that refunds were denied on grounds of sovereign immunity, which trumps any federal constitutional refund right that might otherwise be available; and that petitioners have failed to demonstrate that the HUE tax inflicted any constitutional injury upon them.

Not only do these arguments lack merit, but, apart from the insubstantial attack on this Court's appellate jurisdiction, they have no place at this stage of the case. There is no question here of "the Court subject[ing] Arkansas to monetary liability" (Ark. Rearg. Br. 2), although the Court has been willing to do precisely that where appropriate. See *Iowa-Des Moines Nat'l Bank* v. *Bennett*, 284 U.S. 239 (1931) (Brandeis, J.) (explicitly enforcing a federal right to a refund of taxes that discriminated against national banks). Rather, the Court's decision in this case, like those in the cases listed in the Appendix to our Reply Brief, would simply be a step in a process that might ultimately lead to refunds. It therefore does not matter whether a sovereign immunity defense might be recognized on remand or whether there is a federal right

to refund relief; as the case now stands, it is *state* law that will entitle petitioners to some form of refund relief if *Scheiner* is retroactive as a matter of federal law. See Pet. App. 3a ("[t]o hold the interstate truckers were entitled to [refunds] * * *, we would have to apply the *Scheiner* decision retroactively").

In any event, relevant or not, the State's latest arguments are erroneous.

ARGUMENT

I. THE ELEVENTH AMENDMENT DOES NOT BAR THIS COURT FROM EXERCISING APPELLATE JURISDICTION OVER THE DECISION BELOW

Arkansas' brief on reargument largely ignores the principal contention in its initial brief—that the Eleventh Amendment bars the Court from exercising appellate jurisdiction over this case. (Arkansas has instead constructed another argument based on the Eleventh Amendment, which we address at pages 6-9, *infra*.) We here add only a few thoughts to our prior discussion (Rep. Br. 1-8) of the original Eleventh Amendment argument.

First, Arkansas contends (Rearg. Br. 9-10 n.7) that "many" of the cases cited in our reply brief (at 3-4) are compatible with its Eleventh Amendment theory because in those cases "the state taxes were paid under 'protest,' and recovery of the tax payments was sought through a refund procedure established by State law." Arkansas thus apparently concedes that the Eleventh Amendment does not bar this Court from adjudicating such a case. But this concession is fatal to its argument, for the instant case fits squarely within that category: petitioners filed suit before any HUE taxes were paid and now seek a refund pursuant to state law (Ark. Const., Art. 16 § 13).[1]

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[1] Under Arkansas law, the filing of a suit is the equivalent of payment under protest, see *City of Little Rock* v. *Cash*, 644 S.W.2d 229, 234 (Ark. 1982), cert. denied, 462 U.S. 1111 (1983).

Second, the Court decided several more cases last Term that would fall outside its jurisdiction under Arkansas' view of the Eleventh Amendment, further illustrating the dramatic contraction in the Court's authority that would result from adoption of Arkansas' theory. See *Will* v. *Michigan Dep't of State Police*, 109 S. Ct. 2304 (1989); *Cotton Petroleum Corp.* v. *New Mexico*, 109 S. Ct. 1698 (1989); *Frazee* v. *Illinois Dep't of Employment Security*, 109 S. Ct. 1514 (1989).

In addition, Justice Stevens' separate opinion in *Pennsylvania* v. *Union Gas Co.*, 109 S.Ct. 2273 (1989), squarely rejects Arkansas' approach. Justice Stevens observed that the Court has "balanc[ed] * * * state and federal interests" in determining whether the Eleventh Amendment limits the jurisdiction of the federal courts in a particular context. *Id.* at 2288; accord, *Pennhurst State School & Hosp.* v. *Halderman*, 465 U.S. 89, 105-106 (1984). He concluded that this approach explains why the Court "has repeatedly exercised Article III power to review state-court judgments in cases involving claims that, under [the Court's] post-*Hans* decisions, could not have been brought in federal district court" (109 S.Ct. at 2288 n.3). "[I]f our post-*Hans* state immunity cases are * * * understood as premised on a prudential balancing of state and federal interests, these cases are easily explained: a state-court decision defining federal law tips the balance in favor of federal review" (*ibid.*). This is why Arkansas' attempt to limit this Court's authority must fail.[2]

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[2] Arkansas contends (Rearg. Br. 11-12 & n.9) that the relevant interests balance differently, but it ignores the fact that its rule would preclude review by this Court in any case in which the violation of federal law has ended, thus preventing this Court from ensuring that federal law is correctly, and uniformly, interpreted by state courts. See ATA Rep. Br. 6-7; *Massachusetts* v. *Oakes*, 109 S.Ct. 2633 (1989) (discussed at ATA *McKesson* Am. Br. 20-21).

II. THIS COURT'S POWER TO REVIEW THIS CASE DOES NOT DEPEND ON THE EXISTENCE OF A FEDERAL REFUND RIGHT

Arkansas clings (Rearg. Br. 13-16) to its contention that petitioners' refund claim rests entirely on federal law. As we discussed in our reply brief (at 9; see also *id.* at 6-7 n.8), that view of the case is simply wrong. Arkansas itself acknowledged in opposing certiorari (Br. in Opp. 3) that the decision below did not adopt the State's arguments that refunds would be barred as a matter of Arkansas law; rather it held that refunds were not available because the court believed that, under the federal standard set forth in *Chevron*, the decision in *Scheiner* should not be applied retroactively.

There can in fact be no doubt that Arkansas law creates a cause of action for the refund of illegally exacted taxes. See ATA Rep. Br. 9. The only question that is even arguable is whether, when the State is the taxing authority, sovereign immunity insulates it from the otherwise applicable state-law refund obligation. But that question of Arkansas law, which the State correctly conceded at the certiorari stage was not the basis of the decision below, plainly should not be addressed by this Court.[3]

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[3] Apart from the Arkansas authorities cited in our Reply Brief (at 6-7 n.8) and not rebutted in Arkansas' latest brief, there are other reasons to believe that sovereign immunity is not a bar to a tax refund action in Arkansas. Sovereign immunity is a jurisdictional bar under Arkanas law (*McCain* v. *Crossett Lumber Co.*, 174 S.W.2d 114, 120 (Ark. 1943)), and the issue was fully briefed to the Arkansas Supreme Court. If that court viewed sovereign immunity as a serious obstacle to its consideration of the refund claim, it presumably would have addressed the issue. In addition, the Arkansas Supreme Court has held that sovereign immunity would not preclude the award of credits against future taxes to offset an unconstitutional exaction; that is one form of retrospective relief that could be afforded to petitioners if *Scheiner* is retroactive. See *Federal Compress & Warehouse Co.* v. *Call*, 254 S.W.2d 319 (Ark. 1953). And the Arkansas Department of Revenue has

Arkansas also errs in asserting (Rearg. Br. 14-15 n.13) that if state law supplied the cause of action, no federal question would be presented in this case. As Arkansas itself acknowledges (Rearg. Br. 15), the legal issue decided by the courts below—the retroactivity of *Scheiner*—is distinct from the question whether petitioners have a cause of action for a refund. The federal character of the retroactivity issue is thoroughly discussed in our Reply Brief (at 9-12), and Arkansas, which conceded at the certiorari stage that the issue is one of federal law to be determined under the *Chevron* test (Br. in Opp. 11; see also Am. Br. of California, *et al.*, at 3), makes no serious effort to respond to that argument.

III. EVEN IF THERE WERE NO STATE CAUSE OF ACTION, FEDERAL LAW WOULD REQUIRE A REFUND OF THE TAXES EXACTED BY ARKANSAS IN VIOLATION OF THE COMMERCE CLAUSE

Arkansas advances (Rearg. Br. 5-8) a new argument based on the Eleventh Amendment, contending that the Amendment bars this Court from "subject[ing] Arkansas

elsewhere explicitly acknowledged that "a refund of illegally exacted taxes is an appropriate remedy in an illegal exaction suit." See Defs.' Br. on Remedies, *Brunner and Lay, Inc.* v. *Pledger*, No. 86-4305 (Chancery Ct. Pulaski Cty.), at 1 (filed April 18, 1989).

In any event, Arkansas' attempt to show (Rearg. Br. 13-14 n.12) that sovereign immunity bars a refund action falls far short of the mark. Because the Arkansas Constitution itself creates the tax refund remedy (see Art. 16, § 13)—much like the Takings Clause of the United States Constitution creates the just compensation remedy—the general recognition of state sovereign immunity in the same document is not significant. Cf. *Jacobs* v. *United States*, 290 U.S. 13 (1933) (waiver of federal sovereign immunity not necessary to allow recovery under constitutionally-required just compensation remedy). And the existence of the Arkansas Claims Commission is irrelevant here. Not only is the Commission's authority limited to recommending refunds to the legislature, but it disclaims any power even to consider constitutional claims such as those presented in this case. *Arkansas State Claims Commission Rules and Regulations* at 4 (July 1989).

to monetary liability by declaring that the rule of *Scheiner* governs not only the future, but the past" (Rearg. Br. 8). This contention appears related to the position urged in the NCSL amicus brief on reargument in *McKesson*—that the states' sovereign immunity bars this Court from recognizing a right to monetary relief against a state in its own courts, even if that claim is grounded in the Constitution, even if the Constitution would entitle the plaintiff to monetary relief against a city or a county, and even if sovereign immunity considerations played no role in the state court decision denying the refund.

As noted previously, because of the existence of a state law refund remedy, this case does not require consideration of the extent to which federal law may require refunds of taxes exacted in violation of the Commerce Clause—a subject that we have discussed in our amicus brief in *McKesson*. Nevertheless, both Arkansas and NCSL continue to place so much emphasis on that issue that we must briefly respond to their latest arguments on the point.

A. Neither The Eleventh Amendment Nor State Sovereign Immunity Authorizes A State Court To Decline To Enforce A Remedy Mandated By The Constitution.

1. Arkansas contends (Rearg. Br. 5-8) that the Eleventh Amendment bars this Court from holding that the Constitution ever requires a state to disgorge taxes collected in violation of the Commerce Clause. The argument appears to proceed in the following steps: (1) this Court's power to abrogate the states' Eleventh Amendment immunity is no greater than that of Congress; (2) Congress can abrogate the states' Eleventh Amendment immunity only on a prospective basis, subjecting them to liability for conduct after the date of enactment of the federal statute; (3) retroactive application of *Scheiner* would "subject the affected States to monetary liability without any prior warning" (*id.* at 7); and (4) because Congress could not subject the states to such

retrospective liability, this Court cannot do so by holding *Scheiner* retroactive. This syllogism is rife with errors.

First, the Eleventh Amendment has nothing at all to do with the question whether the Constitution itself provides a remedy, cognizable in state courts, for refunds of taxes exacted in violation of the Commerce Clause. The Amendment limits the *forum* in which a state may be sued, barring the initiation of certain types of suits in federal court. It does not embody some over-arching principle that also insulates states against federal law claims asserted in *state* court. *Nevada* v. *Hall*, 440 U.S. 410, 419-421 (1979); *Employees* v. *Missouri Dep't of Public Health & Welfare*, 411 U.S. 279, 288-298 (1973) (Marshall, J., concurring); see also *Maine* v. *Thiboutot*, 448 U.S. 1, 9 n.7 (1980). Because both this action and *McKesson* come from state courts, the Eleventh Amendment cannot insulate the states from a remedy required by the Constitution.

A second flaw in Arkansas' argument is its erroneous assumption—unsupported by any citation of authority—that the Eleventh Amendment prevents Congress from subjecting the states to monetary liability for acts performed prior to the adoption of a statute waiving the states' Eleventh Amendment immunity. This Court rejected precisely that argument when Arkansas advanced it in *Hutto* v. *Finney*, 437 U.S. 678, 694 n.23 (1978), holding that a state could be required to pay attorneys' fees under 42 U.S.C. § 1988 in lawsuits commenced *before* the enactment of that statute. Indeed, while Arkansas relies heavily on *Union Gas* in this part of its argument, it ignores the fact that the conduct for which Pennsylvania was sued in that very case took place long before the enactment of the federal statute abrogating the states' immunity. See 109 S. Ct. at 2276-2277.

In sum, the states do not need notice that particular conduct will subject them to monetary liability before either an act of Congress or the Constitution may require

them to make monetary amends to those they injure through violations of federal law.

2. NCSL's argument invokes the Eleventh Amendment only by analogy: its claim is that state sovereign immunity, only one facet of which is embodied in the Eleventh Amendment, may bar a tax refund remedy otherwise required by the Constitution. Putting to one side the merits of that position, the issue arises only when the tax refund remedy has been refused because of sovereign immunity. That has occurred neither in the present case (see page 5 & n.3, *supra*) nor in *McKesson*. The Florida Supreme Court's opinion plainly does not rest on sovereign immunity: the ground given would apply equally to a non-immune defendant. Moreover, Florida's brief on reargument concedes (at 17; see also *id.* at 6) that the State has waived sovereign immunity for tax refunds—a concession that is compelled by well-established state law. See McKesson Rearg. Rep. Br. 5-6. Thus, the suggestion by NCSL that federal law should recognize a sovereign immunity defense is simply beside the point.[4]

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[4] NCSL asserts (Rearg. Br. 17, 21) that even if the State has waived sovereign immunity, "[c]onsiderations of sovereign immunity" nonetheless "fundamentally bear" on the refund issue, and "the policies that underlie the doctrine" remain in force. This now-you-see-it-now-you-don't approach to sovereign immunity is completely unfounded. There are any number of grounds that a state court might give for denying refund relief that have nothing whatever to do with sovereign immunity. In the *McKesson* case itself, for example, the Florida Supreme Court's reliance on its "pass through" theory does not in any way implicate sovereign immunity; rather, the court was applying what it regarded as general remedial principles, and it unquestionably would have reached the same result if the tax at issue had been imposed by a county or other governmental unit not protected by state sovereign immunity. Amici trivialize the concept of sovereign immunity insofar as they argue that *any* reason for denying relief against a state—even though not resting on sovereign immunity considerations—necessarily involves sovereign immunity simply because the state is the party.

Even if a state did invoke sovereign immunity, it could not thereby avoid a monetary remedy mandated by the Constitution. The question whether state sovereign immunity may trump a remedy provided by federal law is itself an issue of federal law. See *Martinez* v. *California*, 444 U.S. 277, 284 (1980). Nothing in the Constitution or in this Court's decisions supports the broad sovereign immunity principle advanced by NCSL.

First, the rule that NCSL derives from general language in a few old decisions (Rearg. Br. 9)—none of which actually held that sovereign immunity may be invoked to bar a federal claim (see Wolcher, 69 Calif. L. Rev. at 262-265)—is clearly incompatible with modern immunity principles. Far from upholding state immunity in all circumstances, this Court has made clear that a state *can* be haled into court against its will—as NCSL concedes (Rearg. Br. 14), Congress may subject a state to suit in federal court. In addition, the Court has, in a context similar to this one, refused to recognize a broad immunity rule even for state court proceedings. *General Oil Co.* v. *Crain*, 209 U.S. 211 (1908); see also *Testa* v. *Katt*, 330 U.S. 386 (1947); Wolcher, 69 Calif. L. Rev. at 242-243, 266-267.

Second, a critical ingredient of NCSL's argument is its erroneous attempt to equate the states and the federal government. It contends (Rearg. Br. 15-16) that because the Constitution accords sovereign status to each, the sovereign immunity of each is identical. But sovereign immunity rests "'on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends.'" *Nevada* v. *Hall*, 440 U.S. at 416 (citation omitted). Because the remedy here is grounded in federal law, the states did not "make[] the law on which the right depends"; the rationale for recognizing sovereign immunity is therefore inapplicable. In our federal system, the states are not sovereign with respect to claims

based on superior federal law. See Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 Yale L.J. 1, 79-80 (1988); Wolcher, 69 Calif. L. Rev. at 196, 246-248. They therefore may be subjected to the remedies that the Constitution requires for the protection of federal rights.

Third, NCSL's attempt (Rearg. Br. 13-14) to invoke the Eleventh Amendment is no more persuasive than that of Arkansas. As discussed above, that provision has nothing to do with the question whether the Constitution requires that a particular remedy be recognized in actions in state courts. But even if the Eleventh Amendment were relevant, it would not help NCSL's argument. *Union Gas* established that, despite the Eleventh Amendment, the Commerce Clause limits a state's ability to invoke its sovereign immunity to avoid suit in federal court. The plurality concluded that "to the extent that the States gave Congress the authority to regulate commerce, they also relinquished their immunity where Congress found it necessary, in exercising this authority, to render them liable" (109 S.Ct. at 2284).

The present case follows *a fortiori* from *Union Gas*. For it is not just laws passed by Congress but the negative implications of the Commerce Clause itself that constrain the states in taxing and regulating interstate commerce. When the states, for the good of the Nation as a whole, acceded to this direct constitutional limitation on their sovereign powers of regulation and taxation, they thereby also relinquished their sovereign immunity from suit (which is nowhere mentioned in the Constitution) to the extent necessary to serve the federal interests embodied in the Commerce Clause.

Finally, even if the Constitution could be read to permit the states to assert generally recognized sovereign immunity principles to bar *damages* claims grounded in federal law, that rule would not insulate the states against a constitutional obligation to *disgorge* illegally exacted

taxes in appropriate circumstances. From the earliest days of the Nation, a taxpayer's right to refund relief, through an action against the tax collector (who was then entitled to an indemnity from the government), was well recognized. *Cary* v. *Curtis*, 44 U.S. (3 How.) 236 (1844); Jaffee, *Suits Against Governments and Officers: Damage Actions*, 77 Harv. L. Rev. 209, 228 (1963). The fact that the appropriate proceeding now takes a different form does not cloak the states with a defense that was historically unavailable in such actions.

In sum, there is no warrant for this Court to endorse the counterintuitive proposition that, even if the Constitution requires a particular remedy in order to protect federal rights, such as disgorgement of taxes collected in violation of the Commerce Clause, the Constitution nonetheless permits the states to immunize themselves against the constitutionally-mandated remedy. States, like county and city governments, are inferior to federal authority and therefore cannot assert sovereign immunity to avoid the commands of the Constitution.[5]

B. The Availability Of The Federal Remedy Should Be Governed By The *Chevron* Standard, Not Some More Restrictive Test.

NCSL asserts (Rearg. Br. 4-5) that, by phrasing the question posed to the *McKesson* parties in terms of a violation of "clearly established law under the Commerce

[5] Arkansas (Rearg. Br. 11) and NCSL (Rearg. Br. 22) also claim that this Court's holding in *Will* v. *Michigan Dep't of State Police*, *supra*, that Congress did not intend to subject the States to liability under Section 1983, supports the view that there is no constitutionally based remedy in the tax refund context. But there is no evidence that, by excluding the states from a statute imposing broad new monetary liabilities for *every* violation of federal law, Congress "meant [Section 1983] to foreclose alternative remedies available to those not covered by the statute" (*Davis* v. *Passman*, 442 U.S. 228, 247 (1979)). "On the contrary, [Section 1983] leaves undisturbed" more particularized remedies available directly under the Constitution. *Ibid.*

Clause," this Court meant to indicate that any federal refund right would be restricted to such cases and would not extend more broadly to other types of cases in which the governing decision would be held retroactive under *Chevron*. It seems unlikely that the Court meant to imply any such limitation, rather than simply to describe the circumstances of the *McKesson* case (which are indistinguishable in this respect from the post-*Scheiner* exactions in the instant case). See ATA *McKesson* Am. Br. 6-7. In any event, the limitation proposed by NCSL is contrary to this Court's decisions.

NCSL contends (Rearg. Br. 5) that it is "inappropriate to use a federal refund remedy against state and local government defendants for the violation of what had been unsettled federal law." But this Court reached exactly the opposite conclusion in *Owen* v. *City of Independence*, 445 U.S. 622, 655 (1980), holding that "even where some constitutional development could not have been foreseen by municipal officials, it is fairer to allocate any resulting financial loss to the inevitable costs of government borne by all the taxpayers, than to allow its impact to be felt solely by those whose rights, albeit newly recognized, have been violated."[6] To the extent any limitation upon the federal refund right is appropriate, the *Chevron* standard, which gives due but not exclusive weight to the novelty of the legal rule in question, best reconciles the relevant interests. See ATA *McKesson* Am. Br. 7.

[6] The Court has utilized the "clearly established law" standard in the context of individual liability, where the need to promote the effective functioning of government requires that individuals be insulated from liability for errors in judgment. See *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982). *Owen* recognized, however, that this rationale has no application with respect to governmental liability. See 445 U.S. at 655-656.

IV. THE HUE TAX RESULTED IN ACTUAL DISCRIMINATION AGAINST OUT-OF-STATE CARRIERS

The remainder of Arkansas' brief on reargument (pp. 16-28) consists largely of contentions that, despite its disclaimer (*id.* at 17), cannot be reconciled with this Court's holding in *Scheiner* and that in fact were raised and rejected in that decision. Arkansas' insistent effort to reargue *Scheiner*—a tack also taken in its earlier brief in this case—is inappropriate and simply ignores the retroactivity issue that is now before the Court. Both the incorrectness and the irrelevance of Arkansas' arguments were demonstrated in our previous reply brief (at 12-23), which we here supplement in light of Arkansas' further submission.

Arkansas' principal assertion, which is repeated throughout this part of its brief, is that petitioners are not "victims of discrimination" under the HUE tax. This claim rests on two essential and interrelated premises: (1) that the HUE tax did not disfavor the plaintiff class because the state in which a truck is base-registered is not necessarily the home state of its operator and because not all members of the plaintiff class were in fact injured by the discriminatory feature of the challenged tax; and (2) that *Scheiner* struck down flat taxes solely under the "internal consistency" test and involved no finding that such taxes actually discriminate against interstate commerce.

By this approach, Arkansas attempts to make this case analogous to *McKesson*, in which Florida argues that there was little if any actual injury, and *National Can*, in which (as explained in our opening brief (at 28 n.18, 39)) the invalidated tax presented a hypothetical risk of multiple taxation but in fact had subjected few if any taxpayers to such taxation and thus had not given rise to actual discrimination. The argument is unavailing, however, because it fundamentally misapprehends the governing constitutional principles applied in *Scheiner*.

A. Arkansas' Current Arguments Regarding Discrimination Were Made And Rejected In *Scheiner*.

In *Scheiner*, both Pennsylvania (Br. 2 n.2, 12, 35-36) and Arkansas as *amicus curiae* (Br. 2-4, 10-12) argued that the state of base-registration is easily manipulable, and therefore a showing that a tax disadvantages trucks registered out-of-state does not establish a violation of the Commerce Clause.[7] This Court plainly understood that a classification based on state of registration does not measure with surgical precision the incidence of discrimination produced by flat highway taxes against either interstate commerce or out-of-state truckers, but it nevertheless found such taxes to entail discrimination prohibited by the Commerce Clause. Thus, while the parties had presented the "broad[] * * * constitutional question" whether "flat taxes result in a blanket discrimination against interstate commerce" (483 U.S. at 281), the Court recognized that "[t]he precise issue is * * * more subtle: do the methods by which the flat taxes are assessed discriminate against some participants in interstate commerce in a way that contradicts the central purpose of the Commerce Clause?" *Id.* at 282.

The Court answered that question in the affirmative, concluding that "the Commerce Clause prohibits a State from imposing a heavier tax burden on out-of-state businesses that compete in an interstate market than it imposes on its own residents who also engage in commerce among States" (483 U.S. at 282).[8] And, in language

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[7] Arkansas also advanced the same arguments in its motion to dismiss in *ATA* v. *Gray*, No. 86-358, an earlier phase of the present case that was the companion to *Scheiner*. ATA's reply brief at the jurisdictional stage in *Gray* (at 6-8) contains a further discussion of these issues.

[8] Thus, contrary to Arkansas' submission (Rearg. Br. 20), petitioners' claim would not be impaired even if the sole adverse impact of the HUE tax had been to favor interstate truckers with localized operations (more of whom would obviously be Arkansas-based) over those with more far-flung operations. But in fact the HUE

that dispels any possible uncertainty, *Scheiner* made crystal clear that it is constitutionally immaterial "[w]hether the full brunt, or only a major portion, of the[] burden [of flat taxes] is imposed on the out-of-state carriers" (*id.* at 284); a state's flat highway tax is not rendered any the less discriminatory simply because "some out-of-state carriers which accrue high mileage in [the state] pay the * * * tax at a lower per-mile rate than some [in-state] based carriers" (*id.* at 286). The Court's reasoning thus squarely rejected the argument of Pennsylvania and Arkansas, reiterated here by the latter, that the state of base-registration cannot be used to detect a constitutional violation.

Equally clearly, and contrary to Arkansas' claim (Rearg. Br. 17, 18), the Court held not only that Pennsylvania's flat highway taxes violated the internal consistency requirement but also that they resulted in actual discrimination. See Pet. App. 10a (Blackmun, Circuit Justice). In *Scheiner*, "the cost per mile of each of the flat taxes is approximately five times as high for out-of-state vehicles as for local vehicles" (483 U.S. at 276), and therefore "[i]n practical effect * * * the taxes are plainly discriminatory" (*id.* at 286). See also *id.* at 290 ("Pennsylvania's flat taxes * * * discriminate against out-of-state vehicles by subjecting them to a much higher charge per mile traveled in the State"); *id.* at 292 ("blatantly discriminatory consequences"); *id.* at 296 ("unquestionably discriminatory").

In the present case, the actual average discrimination was approximately 3 to 1 (see ATA Rep. Br. 18 n.17; ATA Ark. S. Ct. Br. 347), without even taking into account Arkansas-intrastate operators, who would derive

tax did more than favor local over national interstate truckers. It also favored purely intra-Arkansas carriers (who, of course, drove *all* their miles in Arkansas) over interstate carriers who conducted their operations among the several states. See note 9, *infra*, and accompanying text.

the greatest benefits from the flat feature of the tax.[9] This conclusion was accepted by the Arkansas Supreme Court in invalidating the HUE tax in light of *Scheiner* (see Pet. App. 2a: "It is conceded that the HUE tax effectively costs other truckers more per mile than it costs those based in Arkansas") and by Justice Blackmun in ordering the escrow (*id.* at 11a: The HUE tax has a "discriminatory impact" that is inherent in "the structure of the tax"). The findings of actual discrimination in *Scheiner* and in this case are of course based on the *average* impact of the taxes on truckers, and Arkansas now rails against use of averages (Rearg. Br. 23), but in light of both common sense and the analysis employed by this Court in *Scheiner*, that objection is plainly untenable.[10]

B. The Fact That Class Members' Refund Rights May Vary Depending On The Existence And Extent Of Their Actual Injury Is No Reason To Withhold Ruling On The Retroactivity Of *Scheiner*.

Against this background, Arkansas' argument boils down to semantics. We readily concede that not all opera-

[9] Arkansas complains (Rearg. Br. 4, 20 n.21) that ATA has not identified particular heavy trucks subject to the HUE tax that were engaged in intra-Arkansas carriage. But, as the State is well aware, the figures in the record were limited to interstate truckers (both Arkansas-registered and non-Arkansas-registered) only because mileage data were not readily available for intra-Arkansas truckers, not because such truckers do not exist. See ATA Rep. Br. 18-19. Contrary to its current position, Arkansas acknowledged in its *amicus* brief in *Scheiner* (at 5) that "there are really three groupings of motor vehicles from which payment is exacted [under the HUE statute]. First, *wholly intrastate Arkansas carriers* with a declared gross weight of over 73,280 that pay * * * a flat $175.00 HUE tax * * *" (emphasis added).

[10] Apart from mileage data relating to operations within Pennsylvania and Arkansas, it must be remembered that five other states also had flat highway taxes. See *Scheiner*, 483 U.S. at 285 n.17. Thus, a nationwide trucker actually had to pay these taxes in seven states—conclusive proof that the taxes operated in practice to penalize interstate commerce.

tors of trucks registered outside Arkansas are entitled by that fact alone to a refund; insofar as their trucks made sufficiently extensive use of Arkansas' highways that they enjoyed a low HUE tax cost per mile (such as the carriers on which Arkansas dwells at length in its brief),[11] they may not be entitled to a refund. By the same token, if any Arkansas-registered trucks engaging in interstate commerce made little use of the State's roads and therefore suffered injury attributable to the interstate character of their operations, they might also have a plausible claim for a refund (though they are not members of the plaintiff class in this lawsuit). Accordingly, Arkansas' position really amounts to a quibble about the adequacy of the terminology "out-of-state trucker" to capture the discriminatory feature of flat taxes that the Commerce Clause prohibits.

For our part, we believe that the phrase "out-of-state trucker" is a useful shorthand to express a concept that, if elaborated in full detail each time it was used, would be cumbersome and unwieldy. Moreover, the state of base-registration is in fact a quite satisfactory first-order proxy for the unconstitutional discrimination that inheres in flat taxes; as the record in this case demonstrates, the overwhelming number (98.4%) of Arkansas-registered heavy trucks elected to pay the flat $175 tax, while the great majority (76.8%) of non-Arkansas-based trucks paid 5¢ per mile and therefore were disadvantaged by the tax. See ATA Ark. S. Ct. Br. 337-338.

Whatever the conceptual imperfections in the phrase "out-of-state trucker," there is no basis whatsoever for Arkansas' claim that it is entitled to keep *all* of the HUE

[11] As Arkansas knows full well, these trucks were base-registered outside the State not so that their operators could join the plaintiff class in this lawsuit but rather to avoid retaliatory taxes passed by a number of states in response to discriminatory flat highway taxes like the Arkansas HUE tax. See J.A. 31; *Scheiner*, 483 U.S. at 285 & n.18.

tax proceeds because no actual discrimination occurred or because the plaintiff class embraces some operators that were not injured by the illegal aspect of the tax.[12] Without question, a substantial number of carriers suffered serious actual discrimination of the very sort that, as the Court held in *Scheiner*, the Commerce Clause condemns. The inherent and undeniable tendency of flat taxes is to benefit those carriers that travel only or predominantly in the state; it hardly should be surprising when that tendency is realized in practice. The logic of *Scheiner* and the record in this case leave no room for doubt that the HUE tax inflicted actual discrimination of a kind that the Constitution forbids. Accordingly, if *Scheiner* is retroactive, petitioners are entitled to pursue their claims for refunds to remedy the actual injury inflicted by the Commerce Clause violation.

C. An Appropriate Refund Remedy Can Be Fashioned To Redress The Actual Discrimination Suffered.

While the fact that the HUE tax had a different impact on different carriers is not material to the retroactivity of *Scheiner* and the existence of *some* refund obligation, it will be relevant to shaping an appropriate remedy if *Scheiner* is held to be retroactive. Arkansas' entire argument on this point (*e.g.*, Rearg. Br. 24-25 & n.31) rests on the mistaken supposition that we are claiming a federal right to full refunds of HUE taxes paid by all members of the plaintiff class. That has never been our position, as we made clear in our opening brief (at 38-40).

The simple fact is that we do not ask the Court to address in any way the question of the amount of refunds

[12] This emphasis on the presence in this case of carriers like Jones Truck Lines seems in large part to be a complaint about the composition of the class that was certified by the Chancery Court back in 1983. But the State never challenged or sought modification of the order defining the class. It is far too late for it to do so now.

due. The precise implementation of the refund remedy may be left in the first instance to the state courts on remand from this Court. Any disputes about which truckers have actually suffered discrimination can be resolved at that stage, and therefore Arkansas' contentions, insofar as they bear on the scope of the relief available, are at best premature. But because these contentions reflect a manifest misunderstanding of the controlling considerations, we briefly outline our position for the Court.

As *Scheiner* recognized, the central vice in flat highway taxes is that they penalize carriers (wherever registered) that engage in extensive interstate transportation rather than confining their operations to one or a few states. A national carrier will pay much more in flat highway taxes than an intrastate or regional carrier that travels the same total number of miles (and thus causes the same wear and tear to the highways) but concentrates its mileage in a single state or a small number of states. Such at system is incompatible with the core policy of the Commerce Clause, which requires that "state boundaries [be] economically irrelevant" and "a neutral factor in economic decisionmaking" (*Scheiner*, 483 U.S. at 283). Under this standard, it is the place of operation—not the place of registration—that is constitutionally determinative.[13]

[13] It is for this reason that the two taxes that respondent relies on (Rearg. Br. 25-26 & n.34) as analogous to the HUE tax are in reality quite different and completely beside the point here. Registration fees are subject either to apportionment under the International Registration Plan (IRP) or reciprocity (see *Scheiner*, 483 U.S. at 272 & n.7), and hence the fact that a trucker conducts its operations in more then one state does not affect its tax liability. The Court in *Scheiner* specifically concluded that registration fees do not violate the Commerce Clause because "a vehicle may pass among the States as freely as it may roam the State in which it is based" and therefore "state boundaries are economically irrelevant" (*id.* at 283). The same is true for a *federal* flat highway tax, since by definition only a single sovereign can impose such a tax. See ATA *Scheiner* Br. 48-49 and ATA *Scheiner* Rep. Br. 9 (discussing the federal tax in *Massachusetts* v. *United States*, 435 U.S. 444 (1978)).

Against this background, a court that had determined that refund relief was appropriate in this case might adopt any one of several options. First, it could order a full refund; we have never suggested that federal law would require such relief, merely that state law may do so.[14] Second, it could order refunds in such amount as it determined to be necessary to restore members of the plaintiff class retrospectively to equal treatment with beneficiaries of the flat tax. Fuel use tax returns and HUE tax returns show the number of Arkansas miles operated by each interstate carrier, from which its per-mile HUE tax cost is readily calculable. The record in this case contains a survey that reflects the average HUE tax cost for Arkansas-based operators. Each carrier could receive a refund in the amount of the excess it paid above the average cost for in-state truckers.

Finally, a court might conclude that the refund should be confined to the amount paid by any carrier in excess of what it would have paid under a nondiscriminatory tax raising the same amount of revenue. The latter figure could be calculated by estimating the total number of miles driven by all heavy trucks and dividing that figure into total HUE tax revenues; the quotient would be the average rate per mile that would have had to be charged if there had been no $175 cap. While the total mileage figure is not readily available because intrastate trucks did not need to report actual mileage, it would be well within the traditional powers of a court to find that amount with the aid of evidence adduced by the parties.

[14] At least in the case of a user tax such as is at issue here, even a full refund should not be unduly burdensome in light of the state's ability to finance the refund through new (but nondiscriminatory) taxes imposed on the same users of the state-provided facility.

Here, such a calculation might not even be needed, since we know that the replacement tax adopted by the Arkansas General Assembly—which is designed to raise the same amount of revenue from the same class of taxpayers, but without a flat cap—employs a rate of 2.5¢ per mile. A court following this third method of calculating refunds could simply order return of any amount paid in excess of 2.5¢ per mile. True, this method would not fully redress the past discrimination (and might for that reason be determined in *McKesson* to be legally inadequate), but it would at least restore the amount that was improperly shifted from local to interstate carriers. While this effort to formulate an equitable refund criterion is ridiculed by Arkansas (Rearg. Br. 19 n.20) on the ground that exact calculation may not be possible, it is manifestly fairer than the State's position than nothing should be repaid even to those who undeniably suffered significant injury from the State's constitutional violation.

It is of course unnecessary for this Court to choose at this juncture among these (or any other) remedial standards. What should be clear, however, is that, contrary to Arkansas' assertion (Rearg. Br. 27-28), a reasonable refund remedy would not interfere with the State's current highway program or relieve interstate carriers of paying their fair share of highway taxes. We have outlined (Br. 37-38; Rep. Br. 22-23) a number of ways in which Arkansas can ameliorate the impact of refunds on its treasury, including issuing long-term bonds to finance the refunds, stretching out payment of refunds over a reasonable period of time, and increasing nondiscriminatory highway taxes such as the fuel tax. In essence, the State would serve merely as a conduit for the reimbursement of truckers that suffered actual discrimination as a result of the HUE tax.

Nor would appropriately measured refunds constitute any sort of windfall to the discriminated-against class;

Arkansas' assertion to this effect not only is baseless but wholly fails to explain why heavy interstate trucks should have been made to pay a greater highway use fee than that paid by their in-state counterparts that weighed exactly the same amount, traveled exactly the same total mileage, and caused exactly the same wear and tear to our Nation's roadways.

In the end, the strenuous efforts to avoid review by this Court of the erroneous ruling by the Arkansas Supreme Court on the retroactivity of *Scheiner* are unavailing. This Court should hold that the Commerce Clause principles applied in *Scheiner* also govern petitioners' claim for refunds of HUE taxes imposed since the beginning of this litigation, and especially those exacted for operations conducted *after* the decision in *Scheiner*.

Respectfully submitted.

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